

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1587

United States Court of Appeals

For the Second Circuit

Docket No. 74-1587

MICHAEL MEEROPOL and ROBERT MEEROPOL,

Plaintiffs-Appellants,

—against—

LOUIS NIZER and DOUBLEDAY & COMPANY, INC.,

Defendants-Appellees,

—and—

FAWCETT PUBLICATIONS, INC.,

Defendant-Intervenor-Appellee.

BRIEF FOR APPELLANTS, MICHAEL MEEROPOL and ROBERT MEEROPOL

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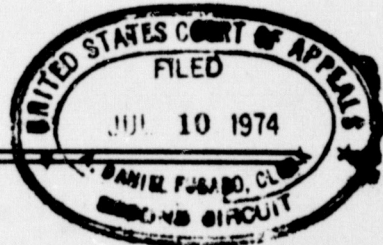


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BRIEF FOR APPELLANTS, MICHAEL MEEROPOL and ROBERT MEEROPOL

Statement of the Case

The appellants, Michael Meeropol and Robert Meeropol, appeal (A. 4-5) * from an order of the district court dated April 3, 1974, signed and entered by the Hon. Harold R. Tyler, Jr., Judge of the United States District Court for the Southern District of New York, (A. 7-9) based upon an opinion rendered by Judge Tyler on April 3, 1974 (A. 130-137). The order appealed from enjoined an action instituted by the appellants Meeropol against appellee-intervenor Fawcett Publications, Inc. in the United States Dis-

* A. refers to the pages of the Appendix.

trict Court for the District of Connecticut and permanently stayed and enjoined the appellants and their attorneys from taking any further action or proceeding in the Connecticut action until entry of a final judgment in this action now pending in the District Court for the Southern District of New York; granted the motion of Fawcett to intervene in the New York action as a party defendant; granted, upon Fawcett's application, appellants leave to file a supplemental complaint against Fawcett; and denied appellants' motion to vacate an order to show cause and restraining order issued, upon Fawcett's application, of March 19, 1974. (A. 7-9) The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1291 and 1292(a). The opinion of the district court is unreported.

Questions Presented

1. Whether the district court had jurisdiction to grant the stay of the Connecticut action?
2. Assuming the court had jurisdiction, was it error for the court to grant the stay of the Connecticut action inasmuch as the defendants were not in privity and adjudication of the issues in the court below would not be dispositive of the issues in Connecticut?
3. Was it an abuse of discretion for the district court to grant the stay in light of all the circumstances set forth herein and the prejudicial impact of such stay on appellants?

Statement of Facts

On June 19, 1973, the Meeropols instituted the present action in the Southern District of New York against Nizer and Doubleday, filing a complaint containing three counts. (A. 10-34) The first count, brought under 17 U.S.C. Section 101, alleged that the Meeropols are the statutory copy-

right owners of certain letters written by their parents, Ethel and Julius Rosenberg, published in 1953, and thereafter, in a copyrighted book entitled DEATH HOUSE LETTERS OF ETHEL AND JULIUS ROSENBERG; that Nizer and Doubleday in writing and publishing the book entitled THE IMPLOSION CONSPIRACY infringed upon the Meeropol copyright by printing and including therein, without the copyright owners' permission, certain copyrighted letters and substantial excerpts therefrom, thus unlawfully appropriating the aforesaid material. The complaint also alleges that Nizer and Doubleday used the misappropriated writings as a means of promoting and selling the book and in so doing not only knowingly infringed upon the appellants' copyright, but further engaged in unfair trade practices and unfair competition. (A. 10-16)

The second count alleges that Nizer and Doubleday wrote and published THE IMPLOSION CONSPIRACY which contained false, fictitious and distorted statements about the Meeropols; falsely portrayed them individually and in relation to their parents and contained false and fictitious conversations and events involving the Meeropols. To import to the reader the authenticity of their writings, Nizer and Doubleday used and infringed upon the aforesaid copyrighted materials. Nizer and Doubleday knew that the writings were false, fictitious and distorted and published such statements with malice, to embarrass, humiliate and ridicule the Meeropols and to invade their rights of privacy. (A. 17-20)

The third count alleges that Nizer and Doubleday, because of the facts alleged in the complaint, did damage to the unpublished letters of Ethel and Julius Rosenberg of which the appellants are the common law copyright owners. (A. 20-21)

Simultaneously with the filing of the complaint the Meeropols moved for a preliminary injunction enjoining Nizer and Doubleday from continuing the infringement of their copyrighted property. By opinion and order dated July 18, 1973, Judge Tyler denied the motion for a preliminary injunction and a cross-motion of Nizer and Doubleday to dismiss the first count of the complaint. The decision is reported at 361 F.Supp. 1063.*

The answers of Nizer and Doubleday essentially put into issue all of the pleadings, acknowledged that a copyright had been obtained in 1953 in the publication of *THE DEATH HOUSE LETTERS OF ETHEL AND JULIUS ROSENBERG*, portions of which were copied in *THE IMPLOSION CONSPIRACY*. As affirmative defenses, Nizer and Doubleday maintained that the copying constituted fair use; that the Meeropols lack standing to sue, that consent to the use of the materials was given by another person allegedly in behalf of the Meeropols; and that some of the writings are in the public domain and rights to the copyright have been lost or abandoned. Nizer and Doubleday in answering the second count, maintained that the subject matter of their book was of historical significance and hence the writings were privileged by the First and Fourteenth Amendments of the United States Constitution. Doubleday, in turn, alleged that it relied upon Nizer's reliability and believed that all of the statements contained in the book were true and any comment was fair and reasonable. (A. 35-48)

* The decision of the lower court denying the preliminary injunction dealt primarily upon the issues raised under the defense of "fair use". The court acknowledged that applying the defense doctrine of fair use one would, upon the trial, have to consider all of the circumstances and there was a substantial question whether letters stand on the same footing as historical facts which are the product of research which in turn form the basis for subsequent works.

Notices of depositions were served by the Meeropols shortly thereafter, upon Nizer and Doubleday. Interrogatories were served upon the appellants. The depositions of Nizer was deferred by the court until after the service of the interrogatories and the disposition of the motions directed thereto. No depositions were in fact commenced until January 29, 1974. Immediately thereafter, on January 30, 1974, Nizer and Doubleday moved for a partial summary judgment on the second count and as a result thereof the depositions relating to that count were deferred and this in turn impaired the examination relative to the remaining counts. This, in substance, is the present status of the depositions of the parties in light of the still pending motion for partial summary judgment and appellants' request for completion of necessary discovery prior to its determination.*

In early December 1973, the Meeropols learned that Fawcett intended to publish a paperback edition of *THE IMPLOSION CONSPIRACY*. Shortly thereafter, on December 7, 1973, Meeropols' counsel wrote a letter to Fawcett by certified mail requesting that it cease and desist from printing, publishing or distributing the paperback edition of the book. Along with the letter, Fawcett was sent a copy of the complaint in this action along with copies of the letters of May 10, 1973 which were previously sent to Doubleday and Nizer, prior to the institution of the action. (A. 66-68, 93, 94) This letter stated in part:

"Were you to publish the above book, your action too would be in violation of my clients' rights, statutory and otherwise.

Please take notice that you are asked to cease and desist from the printing, publication or distri-

* The appellees have not yet deposed the Meeropols. An examination of one non-party witness has been held but not completed.

bution of the book since such action would constitute a repetition and expansion of the wrongs already done for which you would be fully accountable to my clients.

I should appreciate hearing from you upon receipt of this letter with enclosures and further your advising me whether the information I have previously received for your plans with regards to publication of the book is accurate. If so, whether you will comply with the demand made herein.

If you should have any questions, I should appreciate hearing from you forthwith." (A. 67-68)

Fawcett never replied then or at any time thereafter.* (A. 68)

At a hearing on a motion directed to certain interrogatories in the district court on December 28, 1973, counsel for Doubleday complained to the court that appellants' counsel had written the letter of December 7, 1973 to Fawcett threatening legal action in the event that they published the book and continued to violate appellants' privacy and copyrights. It was maintained that such correspondence constituted improper harassment. The court advised Doubleday's counsel that neither the matter nor Fawcett were before the court and hence was not subject to its jurisdiction. (A. 94)

Not having heard from Fawcett, or indeed from Doubleday or Nizer, and learning of the imminence of publica-

* Prior to that time, the appellants had requested that Nizer and Doubleday produce copies of contracts that they may have been entered into relating to THE IMPLOSION CONSPIRACY. The only contract produced was that between Nizer and Doubleday hence appellants had no knowledge of the Fawcett contract, its contents or time of execution until March 19, 1974 (A. 67, 83, 93).

tion, the Meeropols, on March 6, 1974, instituted an action against Fawcett in the Federal Court for the District of Connecticut. (A. 60-74) An order to show cause why a preliminary injunction should not issue against Fawcett was also brought on by the Meeropols and was returnable before Judge Newman of the District Court of Connecticut on March 29, 1974.

The complaint in the Connecticut action, after amendment, has two counts. The first count, in addition to alleging the appellants' ownership of the statutory copyright and the infringements thereof by Nizer, Doubleday and Fawcett, further refers to the prior notice given to Fawcett on December 7, 1973, and that Fawcett, after having been put on notice of the infringement, lack of consent of the copyright owners, and the misuse of the letters and excerpts to alter their meaning and import, nevertheless proceeded to print and publish 800,000 copies of the book and promote the sale thereof on the use made of the misappropriated material.* (A. 60-75)

The second count, after setting forth the allegations concerning the false, fictitious and distorted writings about the Meeropols and Fawcett having been advised that the writings falsely portrayed the appellants and invaded their privacy and held them up to ridicule, embarrassment and humiliation, and Fawcett, being aware of the specifics given by the appellants in the course of the discovery in the present action, nevertheless, in reckless disregard of its duty to investigate or to verify any of the facts or communicate with appellants, knowingly published the book with all the false, fictitious and inaccurate statements referred to hereinabove. (A. 76-80)

* Doubleday had published approximately 100,000 copies of the hardcover edition, of which approximately 85,000 copies were sold at the time of the institution of this action. There has been no further republication of the hardcover edition. (A. 110-111)

The plaintiffs in the Connecticut action made due demand for a trial by jury.* (A. 75, 80)

It is in this context that the proceedings in the court below, which are the subject matter of this appeal, arose.

The Proceedings Relating to the Order of April 3, 1974.

Fawcett, after having been served with the complaint, and motion for a preliminary injunction, never appeared or answered in any way in the Connecticut action.

On March 19, 1974, Fawcett submitted to the lower court an order to show cause with a temporary restraining order for a stay of the Connecticut action. (A. 51-52) At the time of the submission of the order to show cause to Judge Tyler for signature, appellants' counsel advised the court and Fawcett's attorney that the court was without jurisdiction to entertain or sign the order since Fawcett was not a party in the New York action. The order with a temporary restraint was nevertheless signed.** (A. 49-50) The supporting papers submitted in Fawcett's behalf was an affidavit of Robert M. Callagy, who stated that he, as attorney for Fawcett, was presenting it "in support of an application by Fawcett to stay" the Connecticut action. (A. 51) Attached to the affidavit was the appellants' complaint in the Connecticut action, the contract between Doubleday and Fawcett, and a press clipping from the New York Times reporting on an interview with the appellants Meeropol. Callagy, in the affidavit, claimed that the complaints in the two actions were virtually identical; admittedly the defendants are

* By mistake and inadvertence, counsel for the appellants omitted to file a demand for a jury trial in this action until after the answer by Fawcett in April, 1974.

** In the opinion of the district court the appellants' objection was acknowledged to be valid. The lower court argued that this made the show cause order merely "technically defective." (A. 131)

different, but because of indemnification provisions in the Nizer-Doubleday contract and the Doubleday-Fawcett contract "each defense applicable to defendants Nizer and Doubleday in New York will equally be applicable to Fawcett in Connecticut." *, (A. 52) and it would be in the interest of judicial economy to have all of the defendants litigate all the issues in one court. Further, that Fawcett should not be compelled to respond to the motion for a preliminary injunction in that were it granted, there would be a conflict between the decisions in the districts. Callagy stated that Fawcett would consent to appear in the New York action and accept service of a supplemental complaint naming Fawcett as a defendant, upon applicants framing and serving the same. (A. 51-54)

Nizer, at the time of the submission of the order to show cause and thereafter, stood silent and took no position whatsoever.** It is important to note that Mr. Callagy, whether as attorney for Fawcett or Doubleday, or both, never claimed that the indemnification provisions of the Nizer-Doubleday contract or the Doubleday-Fawcett contract, individually or in conjunction with each other ever encompassed all of appellants' claims against Fawcett in the Connecticut action or otherwise. Rather the claim was limited to the argument that by reason of the contracts "each defense" applicable to defendants Nizer and Doubleday in New York will equally be applicable to Fawcett in Connecticut.*** (A. 52)

* Neither the Nizer-Doubleday contract nor its indemnification provisions were set forth in the moving papers.

** The sole affidavit submitted by Nizer in the entire matter was one dated March 29, 1974, acknowledging that he had read Fawcett's subsequent motion to intervene as a party defendant. "I consent to the entry of an order granting the relief therein requested." (A. 123)

*** Appellants dispute that claim in that the facts are materially different as they apply to Fawcett vis a vis Doubleday and Nizer in light of the notice and knowledge long prior to publication.

On March 20, 1974, knowing the court had no jurisdiction to issue the order to show cause, counsel for Fawcett sent a letter noting that his affidavit in support of the order to show cause "specified that it was being made in behalf of the defendant Fawcett and the accompanying memorandum of law contained the same statement", and further, he wished that the Court "deem my moving affidavit and memorandum of law amended to show that the application is being made in behalf of the defendant Doubleday & Company, Inc. joined by defendant Fawcett in the Connecticut action". (A. 88) The aforesaid letter was received by appellants' counsel on March 21, 1974 and by Mr. Gruber, appellants' Connecticut counsel, on March 23, 1974. (A. 90-91)

Appellants cross-moved to vacate and set aside the order to show cause and restraining order, submitting affidavits in support of that motion as well as in opposition to the order to show cause, on the grounds that the district court had no jurisdiction to issue the order to show cause in that Fawcett was not a party, and in any event, no showing was made entitling either Fawcett or Doubleday to the relief sought. (A. 81-87, 89, 90-99) It was conceded by appellees that Fawcett had no standing to seek or obtain relief sought. Appellants challenged the validity of the attempt of Doubleday to retroactively rearrange, recast or amend the order to show cause (A. 90-92, 82-84). Appellants' affidavits noted there were three separate real parties in interest, that neither Nizer nor Doubleday were parties to the Connecticut action just as Fawcett was not a party to the New York action. Fawcett did not stand in the same posture of Nizer or Doubleday either factually or legally and this was reflected in the two complaints, which in turn posited different factual and legal issues for the parties affirmative and defensive—in each of the

actions. Thus, the claim of Fawcett and Doubleday that the defenses in the two actions would be identical were equally unfounded. (A. 83-84, 97-98)

With respect to the two contracts, i.e. the Nizer-Doubleday contract and the Doubleday-Fawcett contract—there were material differences regarding the indemnification and warranty provisions thereof. Neither Fawcett, Doubleday or Nizer claim that the indemnification provisions of the Doubleday-Fawcett contract encompassed and indemnified Fawcett for all of the claims in the Connecticut action. The two indemnification provisions are so materially different and vary in scope that the obligations *inter se* between all the appellees that their interests, liabilities, accountabilities and defenses would differ sharply. (A. 83-84, 92-94, 97-99, 108-109)

The very nature of the contracts between the parties-defendant and the positions of the parties *inter se* establish a clear conflict in interests amongst them and hence no one attorney could represent both parties.* (A. 83, 92)

The difference in the issues are apparent in examining the Connecticut and New York actions and underlying facts. Admittedly, the first count in both New York and Connecticut actions are both based upon the charge that the appellants' statutory copyright was infringed upon. There is no serious question of the validity of the copyright or appellants' standing to sue. As reflected by the opinion of the district court on the motion for a preliminary injunction in this action the prime defense issue with respect to count I is that of "fair use" of the copyrighted

* Obviously this was discernible to Fawcett and in its affidavits in support of the motion to intervene it carefully limited Doubleday's counsel role as its attorney by stating it was "to provide the primary defense in this litigation", thus reserving to itself the right to have its own counsel.

material. The defenses of Nizer and Doubleday in pleading "fair use" are premised upon the claimed belief of appellants' consent or apparent authority and innocent or inadvertent error. Such claim would not be applicable to the Connecticut action, in view of Fawcett's having been given prior notice by appellants letter of December 7, 1973. To an even greater degree the fact issues in the two actions differ in the second count of each of the complaints founded upon defamation and invasion of privacy (discussed *infra*).

Both in the affidavits seeking to vacate the order to show cause and in opposition to the relief requested by that order and in the affidavit submitted in opposition to the settlement of the order, the appellants noted that Fawcett as well as Doubleday long had knowledge of the pendency of the New York action prior to the institution of the Connecticut action, and Fawcett never sought to intervene as party defendant nor did Doubleday seek to implead Fawcett. (A. 83-85, 93-96, 113-114) Moreover, after the institution of the Connecticut action, Fawcett made no attempt either to move in Connecticut for a stay of the action in that court or transfer the action to the Southern District of New York.*

Neither Fawcett or Doubleday pursued this course. Their objective plainly was to avoid submitting to the jurisdiction of the Connecticut court and permitting it to hear the motion for a preliminary injunction. Rather they chose to follow an improper and at best irregular procedure of moving for a stay in the Southern District of New York as a means of vitiating appellants' vested

* Equally Doubleday and Nizer could have sought to intervene in the Connecticut action since the Connecticut court had both jurisdiction and venue.

right to a jury trial for which due demand had been made. Were the Connecticut action transferred and ultimately consolidated, it would have carried with it the trial by jury. It was Fawcett who was doing forum-shopping to avoid a possible preliminary injunction and jury trial.* (A. 112)

Fawcett and Doubleday did not respond to the appellants' affidavits or dispute the facts there set forth, nor did they make any claim that the indemnification agreement either under the Nizer-Doubleday contract or the Doubleday-Fawcett contract indemnified Fawcett for liabilities arising out of the Connecticut action.

On the return of the order to show cause on March 22, 1974, no hearing was had on any of the disputed issues of fact, including those relating to the terms of the two contracts. After brief colloquy, the district court concluded that the issues raised by appellants were "mere technicalities, rules or formalities" and the permanent stay for injunction was granted orally and summarily. At appellants' request, the district court agreed that it would render an opinion with appropriate findings of fact.**

At the time of the parties' appearance before the lower court on March 22, 1974, the court stated that it was conditioning the granting of the stay or injunction of the Connecticut action upon the filing by Fawcett of an affidavit stating that the claims in the Connecticut action were subject to indemnification by Doubleday and that Fawcett was doing business in New York and would agree to appear as a party-defendant and move to intervene "within a reasonable time." (A. 117)

* The circumstances were such as to warrant, if there were to be a transfer, that the New York action be transferred to Connecticut since it was Fawcett in Connecticut who was in the process of publishing 800,000 paperback copies of book.

** No court reporter was present although it had been requested.

Prior to the court's handing down its written opinion and findings of fact on March 28, 1974, Fawcett, on March 29, 1974, moved to intervene upon an affidavit by Leona Nevler, an officer of Fawcett. (A. 121-122)

Totally missing from this affidavit is any statement by Fawcett even suggesting "that the claims asserted in the Connecticut action were subject to indemnification by defendant Doubleday." Its absence is quite explicable. Fawcett could not honestly make such a claim as it would have had no foundation in fact.

In opposition to the proposed order submitted by Doubleday "joined by Fawcett Publications, Inc.", appellants submitted an affidavit claiming that the order to show cause and any relief granted thereon was beyond the lower court's jurisdiction, and *inter alia* restated appellants' denial that the Doubleday-Fawcett contract indemnified Fawcett for all claims encompassed by the Connecticut action and noted the qualitative different indemnification provisions under the two contracts.* (A. 107, 111)

On the return day of Fawcett's motion for leave to intervene, April 5, 1974, appellants offered an affidavit in opposition, noting that the condition precedent for such intervention, i.e., a statement by Fawcett that under the contract with Doubleday the indemnification covered the claims set forth in the Connecticut complaint had not been met. (A. 125-129) Unbeknownst to the appellants, however, an opinion had been rendered and order signed on April 3, 1974 granting the stay of the Connecticut action and Fawcett's motion to intervene. (A. 138-144) When appellants' counsel nevertheless asked leave to file the affi-

* The indemnification provision of the Doubleday-Fawcett contract is to be found at pp. 56 and 57 of the Appendix. On appeal the indemnification provisions of the Nizer-Doubleday contract are to be found in the appendix to this brief.

davit in opposition to the motion to intervene the court stated that the position taken by appellants were "quaint legalisms" and "fancy nonsense" (A. 142) and that the court was proceeding "on an order of this Court conditioning the granting of other relief upon Fawcett appearing here without any fancy nonsense, and filing an answer to your amended complaint which still has to come against Fawcett." (A. 142)

The Opinion of the Lower Court

The lower court found that the original show cause order was "technically defective" in that it was brought on by counsel "purporting to appear for Fawcett", not a party to the New York action. It found this defect cured by the letter of Satterlee & Stephens dated March 20, 1974. The lower court found the two actions virtually identical "save for some additional details having to do with the fact" that Fawcett was the paperback publisher. The court found it "undisputed that by contractual arrangements between Doubleday and Fawcett the former has agreed to indemnify Fawcett for claims resulting from its publication of the paperback version." The opinion adverted to one of its conditions precedent, that Fawcett intervened but made no reference to the affidavit by Fawcett it said it would require covering the scope of the indemnification under the Fawcett-Doubleday contract. As to appellants' argument regarding the demand for a jury trial in the Connecticut action, the lower court's response was that that matter could come on for determination after appellants filed a supplemental complaint. The decisional authority for the court's opinion cited by it was *MacLaren v. B.I.W. Group, Inc.*, 329 F. Supp. 545 (SDNY, 1971).

Fawcett, in an answer dated April 10, 1974, repeated Doubleday's answer verbatim and only acknowledged that at some undefined time it published a paperback edition of

the book and in doing so depended upon its high opinion of Doubleday's reliability. (A. 145-150). The answer is devoid of any reference to any contract between Doubleday and Fawcett, or the prior notice received from appellants, or any assertion of a right or interest Fawcett had in the litigation.

Upon receipt of the answer, appellants filed a demand for a jury trial. (A. 151). All appellees moved to strike the demand for a jury trial, arguing that the complaint in the New York action in no way names Fawcett as a party or makes a claim against it, and that notwithstanding the filing of an answer by Fawcett, the demand for a jury trial was premature. (A. 159-160) The rationale of Fawcett, as expressed in its memorandum, was that its answer was in substance merely a "technical" answer, stating:

"Fawcett did file an answer to the present complaint in this action on April 10, 1974. However, this complaint does not seek any relief against Fawcett, and this action by Fawcett was taken only so that its position with respect to the complaint would be known to the plaintiffs and the Court."

Appellants cross-moved, requesting a jury trial under Rules 38 and 39 of the FRCP, as a matter of right and discretion, and noted that the chaotic status of the record inevitably flowed from the "technically defective" order to show cause of March 19, 1974 and the patchwork procedural techniques that thereafter ensued.*

* On June 27, 1974, the lower court concluded that appellants had waived their right to a jury trial against Nizer and Doubleday, and while the right to a jury trial cannot be revived merely by the filing of a supplemental complaint, the demand for a jury trial as applied to Fawcett was premature and would have to await the filing of a supplemental complaint.

ARGUMENT

POINT I

The district court had no jurisdiction to enjoin the Connecticut suit. The order of the district court should, therefore, be reversed.

The Statement of Facts, *supra*, makes abundantly clear the procedural morass in which appellants found themselves involved when Fawcett, a stranger to the proceedings in New York, nevertheless successfully sought to enjoin the Connecticut proceedings after institution of the proceeding in Connecticut against it.

Quite clearly, at the time Fawcett on March 19, 1974, moved for an order temporarily and permanently staying the Connecticut suit, the lower court below was without power to act on Fawcett's application. We know of no rule of federal procedure, nor of any statute, or decisional law which would grant the court below jurisdiction on the application of a non-party, total stranger to a proceeding, to move for any kind of relief in the proceeding, let alone, to move for the exercise of the court's equitable power to grant extraordinary injunctive relief. Nothing more destructive to our entire adversary system of justice can be imagined if such conduct by a stranger were to be permitted or condoned.

The district court, in its opinion, agreed that the original order to show cause was "technically" defective because of Fawcett's lack of standing. We can only assume that it was the district court's understanding that such technical defect deprived it of any power to act on Fawcett's application of March 19, 1974. Such fundamental defect can hardly be labelled technical. Disregard thereof of such matters could wreak havoc in the orderly processes of the law. The issue, therefore, arises as to how

and when the district court ever did acquire the power to act on the order to show cause.

Presumably, it claims to have been vested with such power on March 20, 1974, when counsel, now purporting to act both for the stranger (Fawcett) to the proceedings and for one of the parties therein (Doubleday) sent a letter (A. 88) to both the court and counsel in the New York proceedings requesting that the court deem the application and the supporting papers be amended to read as if it had been made by Doubleday and Fawcett, rather than Fawcett alone.*

We have found no authority, nor does the district court or appellees tender any such, which would permit an amendment of a jurisdictionally defective application made by a non-party who had no standing to seek, let alone receive, any relief from the court by the device of changing parties by a letter from an attorney who at that time lacked even the apparent authority to make such change. The letter sought to resurrect the improvidently granted order by having Doubleday enter into the application and keeping Fawcett in as a co-movant. Under the cloak of a mere "technical defect" parties are being substituted and joined without a scintilla of evidence to substantiate either authority or jurisdiction.

The fundamental flaw that existed at the time of the granting of the order to show cause is reflected on the face of the order appealed from which provides that the order for the stay of the Connecticut action is granted upon the

* It should be noted that at no time has Doubleday filed any affidavit of authority to move on behalf of Fawcett as its counsel purported to do by the letter of March 20, 1974. The Nevler affidavit submitted on the motion to intervene on March 29, 1974 would indicate that Fawcett was advised *only after* the court granted the permanent stay that anyone was moving in behalf of Fawcett. (A. 123)

application by order to show cause of Doubleday and Fawcett. (A. 7, 9) If the court lacked the jurisdiction as it is admitted to grant Fawcett's application for a stay, it being a non-party, the mechanical "engrafting" of Doubleday on the application by the letter of March 20 does not cure the basic jurisdictional defect, and appellants' motion to vacate the order to show cause *ab initio* allowing the restraining order should have been granted.

In its opinion the district court totally ignores the appellants' claim repeatedly urged upon it that it had no power under the given circumstances to issue the order to show cause pursuant to which the Connecticut stay was granted. Instead, it seems to have premised its power to act upon the claimed identities of parties, interests and issues. But the question of identity of interests and issues can only arise when the court has the power to pose, and decide the question of such identity. In acting as it did, without authority, the court only forced appellants to litigate with Fawcett in New York issues which could only properly have been litigated in the district court of Connecticut. The court's lack of jurisdiction could not be repaired by a bootstrap operation of conditioning the stay of the Connecticut action upon the subsequent intervention of Fawcett as a party defendant in New York.

POINT II

In any event the district court below erred in enjoining the proceedings in the Connecticut district court because the defendants in the two cases are not in privity and because adjudication of the issues in the court below would not be dispositive of the issues in the Connecticut case.

A district court may enjoin a subsequent instituted proceeding in another district court only if the proceedings in both courts involve the same parties and the same issues

and a determination of the issues in the first action would dispose of the issues in the second. *National Equipment Rental Ltd. v. Fowler*, 287 F 2d 43 (C.A. 2, 1961); *Cresta Blanca Wine Co. v. Eastern Wine Corp.*, 143 F 2d 1012, 1014 (C.A. 2, 1944) where this Court said: "[T]he duty to enjoin the prosecution of a proceeding later instituted in another federal district arises 'only if the controversy in each court involves the same issues and the same parties'"; *Thermal Dynamics Corporation v. Union Carbide Corporation*, 214 F. Supp. 773 (S.D.N.Y., 1963).

Where the plaintiffs in the two actions are the same, but the defendants are not identical, the district court may enjoin the later instituted action only if the defendants are in privity with each other. *Telephonics Corporation v. Lindley & Co.* 291 F 2d. 445 (C.A. 2, 1961); *Maclaren v. B.I.W. Group Inc.* 329 F. Supp. 545 (S.D.N.Y. 1971); and *Urbain v. Knapp Bros. Mfg Co.*, 217 F 2d 810, 815 (C.A. 6, 1954).

But even if the plaintiffs are identical and the defendants are in privity, there is no warrant for the exercise by the first court of its injunctive power if an adjudication of the issues therein would not be dispositive of all, or substantially all, of the issues in the second action. *Thermal Dynamics Corporation*, supra; cf. *Simon & Schuster v. Cove Vitamin and Pharmaceutical, Inc.*, 211 F. Supp. 72 (SDNY, 1962).

Because in the case at bar the requirements of privity between the defendants Doubleday and Nizer on the one hand and Fawcett on the other has not been met, and as the determination of the issues in the New York action would not substantially dispose of the issues in Connecticut, the district court's order staying the Connecticut action should be reversed.

a) On The Issue of Privity

The district court bottomed its stay order, primarily on a finding of fact not pleaded by any of the defendants that "Fawcett has been indemnified by Doubleday against claims arising out of its publication of the paperback edition . . ."

As appellants' Statement of the Facts reveals, there are two indemnification contracts involved in this proceeding. The first between Fawcett and Doubleday, the second between Nizer and Doubleday. Comparison of the two agreements demonstrates that the Doubleday-Fawcett indemnification is significantly more limited in scope than that between Nizer and Doubleday since the former does not cover liability for "obscene or libelous" writings, or any "violation of any right of privacy".

Quite clearly if the plaintiffs were to prevail against Fawcett on the second count of the complaints, the operative effect of the Nizer agreement to indemnify Doubleday would become a matter of considerable monetary importance to Nizer. Undoubtedly for this reason Nizer has at no time admitted or conceded that the plaintiffs claims against Fawcett would ultimately be his responsibility if plaintiffs were to prevail. There would clearly appear to be conflicting interests between Nizer, Doubleday and Fawcett in respect to the scope and coverage and ultimate responsibility under the respective indemnification agreements set forth.

Nevertheless, the district court, in apparent reliance on *MacLaren*, and in order to justify Fawcett's intervention found that the Fawcett-Doubleday indemnification agreement in effect established that necessary privity between the defendants for it to exercise its power to enjoin the Connecticut action.

The opinion in *Maclaren* does not set forth the terms of the indemnification agreement there relied on to establish privity between the defendants. Nor are the terms of the indemnification agreement set forth in *Telephonics* upon which appellees also rely to uphold the order of the district court below.

But since both *Maclaren* and *Telephonics* are patent cases the conclusion is warranted that the indemnification agreements set forth therein are as precise and all-embracing as the indemnification agreement set forth in full in *Urbain* at page 812.

In none of these three cited cases, unlike the situation in the case at bar, does it appear that because of differences in the agreements themselves there were incipient conflicts of interest between indemnitors and indemnitees, nor that any indemnitor had failed to concede and accept ultimate responsibility to the losing party based upon an executed indemnity agreement. These cases rather than being supportive of the district court's order are authority for appellant's claim that the required relationship of privity between the defendants Fawcett, Doubleday and Nizer does not exist. See, also *International Nickel Co., Inc. v. Ford Motor Co.*, 108 F. Supp. 833 (S.D.N.Y., 1952) where the court denied a stay on the grounds of lack of privity although one defendant had agreed to indemnify the other.

b) Adjudication of the Issues in New York would not be dispositive of the issues in Connecticut

Even were appellants' argument that the district court erred in finding the requisite privity between the appellees to be rejected, the order appealed from should nevertheless be reversed because the issues framed in the Connecticut

action are different from the issues in New York and adjudication in the latter would not be dispositive of those in the former.

The thrust and operative facts of the Connecticut complaint decisively distinguishing it from the New York complaint, with respect to the first count is that Fawcett had written notice for many months prior to publication of the paperback edition of the book of appellants' copyright claims of misappropriation and infringement without their consent. Moreover, with respect to the second count Fawcett was on notice that appellants' claim that such infringement and misappropriation was accompanied by distorted use of the copyright material as well as by false and fictitious statements about appellants which both defamed and embarrassed them and invaded their privacy.

While admittedly, prior notice to Fawcett would not affect some of the issues in the first count of the complaints in both cases, viz., whether there was a valid copyright, whether appellants had standing to sue, and whether some of the material was in the public domain, such prior notice would be a decisive circumstance in determining whether the defense of "fair use" of the copyrighted material would be available to Fawcett.*

The issue of "fair use" as a defense by Doubleday and Nizer in New York was the prime question facing the district court on appellants' application for a temporary injunction in the New York proceeding and on appellees' motion to dismiss the first count of the complaint sounding in copyright infringement.

* Fawcett has filed no pleadings in Connecticut. But, in its purported answer in New York (pp. 145, 147) it sets up a "fair use" defense which presumably it would also plead in the Connecticut action were the stay to be vacated.

In the opinion denying the temporary injunction and appellees' motion to dismiss, the district court, commented upon the Doubleday-Nizer "fair use" defense stating that such a defense "would seem to be a function of all of the circumstances and the plaintiffs' should have the opportunity to rebutt the presumption that arises from the nature of the materials and the circumstances described herein." 361 F Supp. 1063.

While we do not concede that Nizer and Doubleday can sustain a "fair use" defense, certainly one of the compelling "circumstances" establishing the difference in the two actions is the prior warning to Fawcett and its prior knowledge of appellants' specific claims that the copyrighted matter was being used unfairly to the appellants' damage.

It is submitted that even if the district court in New York on the trial of the merits were to find that the "fair use" doctrine was available to the New York defendants on the copyright infringement issue, such a finding would not dispose of appellants' claim in Connecticut that Fawcett by reason of its prior knowledge of appellants' claims and disregard of the warning should be foreclosed in that light of such facts from having the benefit of the fair use doctrine.

Fair use of copyrighted material is a matter of privilege and not of right. While such a privilege might be available to a user of copyrighted material who, in good faith and innocently, has used such material, it would be unwarranted to grant the same privilege to a user like Fawcett who had knowledge and notice that his proposed use is tortious, and who chose to disregard the warning. Even were the trier in New York to find good faith and innocent use by Nizer and Doubleday in New York, such

a finding would not resolve the issue of good faith on Fawcett's part in Connecticut so to permit it the benefit of the "fair use" privilege.

Thus, with reference to the first count in each complaint, the elements which distinguish the issue of "fair use" as it would be litigated in Connecticut, from that issue as it would be litigated in New York, leads to the conclusion that the determination thereof, in either court, would not resolve or be dispositive of that issue in the other court.

With respect to the second count in each complaint, it is equally apparent, that the factual and legal issues with respect to the liability of the appellees are so basically different that a finding in one court would not be dispositive of the issues in the other court with respect to invasion of privacy and defamation.

In the second count in the New York action as more fully set forth in the Statement of Facts the appellants allege that Nizer and Doubleday invaded the privacy of the appellants, wrote falsely about them and their relationship with their parents, wrote fictitious conversations and imagined events involving the appellants and falsely portrayed their feelings, motives and attitudes; that appellees invaded appellants' privacy and wrote all of the above with knowledge of the falsity of the writings and in reckless disregard of the truth. Nizer and Doubleday in the New York action allege *inter alia* that the statements are not false, fictitious or inaccurate; in any event they claim that the writings were not knowingly false and were not written with a reckless disregard of the truth. Clearly the defendants in framing their defenses seek to obtain whatever protection may be available to them in light of the

Supreme Court decisions in *New York Times Co. v. Sullivan*, 376 U.S. 254; *Time, Inc. v. Hill*, 384 U.S. 374; and *Rosenbloom v. Metromedia*, 403 U.S. 29.

While appellants do not for a moment concede that Nizer and Doubleday fall within the protection and the criteria of the Supreme Court cases just cited, see *Gertz v. Welch*, United States Supreme Court, No. 72-617, 1973 term, decided June 25, 1974, — U.S. —, it is very clear that Fawcett's posture is completely different from that of Nizer and Doubleday. Long prior to the publication of the paperback edition, they were told of the false inaccurate and distorted writings, they were told that much of the book at issue was fictitious and constituted an invasion of the privacy of the appellants. Fawcett was put on notice. In the answers to the interrogatories filed by the appellants in this action the false statements were set forth with great particularity and, in many instances, the true facts were set forth. This was available to Fawcett and their attorneys. Fawcett nevertheless disregarded the appellants' claims and republished the false and malicious statements and continued the invasion of appellants' privacy. Surely, determining the factual and legal issues of Fawcett's liability under the above cited Supreme Court cases would be basically different in the Connecticut action from that in the New York action. The question of punitive damages in light of *Gertz v. Welch supra* would be factually and legally different in the two actions, and any disposition in one would not resolve the issues in the other. The same would apply to the issue of compensatory damages for defamation and invasion of privacy.

The above analysis of the difference in basic issues between the New York and Connecticut actions sharply distinguishes the case at bar from the cases heretofore cited by appellees in support of the district court's order enjoining the Connecticut action.

The crux of the issues in *Telephonics*, *Urbain*, and *Mac-laren* was the validity of the patents and infringement thereof. In all of these cases, the court enjoined prosecution of a later instituted case precisely because a decision on such validity or infringement of the patent involved in the first commenced action would be determinative of all the issues in the later action. See also cases cited by the court in *Thermal*, at page 773.

Just as clearly in *Coakley & Booth, Inc. v. Baltimore Contractors, Inc.*, 367 F. 2d 151 (C.A. 2, 1966), and *National Equipment, supra*, a decision by the Court of first jurisdiction as to whether a contract had been breached or performed would have been dispositive of the issues in the second court.

On the other hand, the refusal of the district court, in *Thermal* to enjoin the later commenced action, after extensive analysis of the difference between the issues set forth in the two forums lends substantial support to appellants' claim herein that because of the difference in basic issues between the New York and Connecticut action, the Connecticut suit should not have been enjoined and consequently the order of the District Court below should be vacated. Finally the decision of the district court in *Simon & Schuster v. Cove Vitamin & Pharmaceutical Inc.*, *supra*, (Tyler J.) denying a stay of a later commenced suit in a state court did so on the *possibility* that "it is by no means clear at this stage that the state court action will be 'conclusive' of the issues in this federal action."

Thus the dominant consideration in denying a stay in both *Thermal* and *Simon & Schuster* was the possibility that the issues of one forum would not necessarily be conclusive in the other and hence the stays were denied as it should have been by the lower court here.

POINT III

The Granting of the Stay Order by the lower Court was an Abuse of Discretion Which Unlawfully Prejudiced the Rights of Appellants.

The Doubleday-Fawcett contract was signed on April 27, 1973. Nizer and Doubleday received written notice on May 10, 1973 of appellants' claims set forth in the complaint in the action instituted in the court below on June 19, 1973 and reported in the trade and public press. (A. 24-34) At no time thereafter did Fawcett seek to intervene as a party in the New York action nor did Nizer or Doubleday seek to implead Fawcett. They all chose to keep the Fawcett contract a secret.

With the imminence of publication, appellants correctly chose Connecticut as the forum for the action, where Fawcett has its principal place of business and was then about to print, publish and distribute approximately 800,000 copies of the book. The motion for a preliminary injunction was returnable in Connecticut three weeks after the institution of the action, on March 29, 1974.

Fawcett had more than adequate time to move in Connecticut to transfer action to New York, or for a stay of the action in that court on any grounds it may have saw fit to tender, but Fawcett chose the improper gambit of applying in the New York court, where it was not a party, for a stay of the Connecticut action. Why Fawcett chose this procedure to circumvent the Connecticut court and the federal transfer statute, 28 U.S.C. § 1404(a), is obvious.

Fawcett sought by all means to avoid submitting itself to the jurisdiction of the district court in Connecticut. That court may, even while considering any such application, have been impelled to issue a preliminary injunction

against Fawcett, who was blatantly violating appellants' copyrights after having been fully put on notice. So Fawcett fled the Connecticut forum by moving as a non-party for a stay in New York. Fawcett sought by these means to achieve another objective, to deprive appellants of the jury trial which they had timely demanded in the Connecticut action. Even if Fawcett had moved and prevailed in a motion for a transfer, in the Connecticut court, the transfer order would have carried with it appellants' vested right to a jury trial.

An examination of the Callagy affidavit, (A. 51-54) submitted in support of the March 19, 1974 order to show cause, would further explain Fawcett's trepidation in moving for a transfer of the action in Connecticut. Section 1404(a) permits a change of venue where it is "in the interest of justice". The Connecticut court could well have found that it would be contrary to the interests of justice to transfer the action when Fawcett, in Connecticut, was actively engaged in a massive infringement upon appellants' copyrights. In addition, the Callagy affidavit was totally devoid of any equitable grounds that Fawcett might invoke to urge the court to transfer (or stay) the Connecticut action.

As the return date for the preliminary injunction approached in Connecticut, Fawcett and their co-appellees devised the inept scheme, *in their forum shopping*, to avoid the perils of Connecticut jurisdiction. Fawcett, a non-party moved for a stay of the Connecticut action in the Southern District of New York.

Trial was far from imminent in the New York action. Discovery was far from completed and motions relating thereto were still pending. The two depositions noticed were proceeding slowly in truncated fashion because of the still pending motion for partial summary judgment and appellants' application for leave to proceed in full in its

discovery of the defendants Nizer and Doubleday. Witnesses essential to both parties for deposition have not yet been noticed for examination in light of the pending unresolved issues in the lower court. Fawcett, whether or not the Connecticut action is stayed, must be deposed and afforded the right to engage in discovery. Any supplemental complaint would broaden rather than narrow the issues, and lengthen the discovery proceedings.

Thus, any claim that the order of the lower court serves judicial expediency, efficiency or economy, is not supported by the facts. There would neither be a reduction of the number or a narrowing of issues. Each of the parties-defendants has his or its own independent defenses based upon the particular facts applicable to it. Neither the operative facts underlying the two separate complaints or the complaints themselves are identical, and these operative facts under the relevant law would not be common to the parties on crucial issues. Thus there would be no "resulting savings of time and money to the federal courts, the litigants and their counsel". (A. 133) With separate actions pending in the two districts depositions in one action, to the extent relevant, would be available in the other action.

Rather, the only effect of the order appealed from is to prejudice appellants rights. It deprives them of their day in the Connecticut court to be heard on their motion for a preliminary injunction against Fawcett and it creates the procedural prejudicial chaos from which the appellees seek to deprive appellants of their right to a jury trial.

Neither Fawcett nor its belated co-movant, Doubleday, could truly maintain that either the purpose or effect of the order appealed from was to serve "the interests of justice". Had Fawcett applied solely for a transfer of the action from Connecticut to New York, "the interests of justice" would require its denial if it served to deprive appellants of their day in court or a jury trial. See *Pope v. Atlantic Coast*

Line R. Co., 345 U.S. 379; *Hoffman v. Blaski*, 363 U.S. 335; *Van Dusen v. Barrack*, 376 U.S. 612. Surely the more drastic remedy of injunction staying the Connecticut action, contrary to the interests of justice should not be invoked—when the only result is prejudice to appellants' rights to a jury trial and denial of due process and their being estopped from a hearing on their application for a preliminary injunction in a forum properly chosen with jurisdiction to consider the matter.

The lower court, in disposing of appellants objections by characterizing them as "technical", "skirmishing" with "quaint legalisms" was profoundly in error. It is these very "legalisms" reflected in the federal rules and statutes which insure essential fairness and procedural due process and prevents summary deprivation of substantive rights. The lower court compounded its error by condoning and sanctioning the appellees makeshift devices to avoid the orderly processes and obligations imposed by the rules of the game. The lower court's summary disregard of these important considerations in its search for judicial economy or expediency resulted in an abuse of its discretionary powers all to the prejudice of appellants rights. The entire procedure from its inception was wrong and cannot be permitted to stand.

CONCLUSION

The order of the lower court should in all respects be summarily reversed and vacated.

Respectfully submitted,

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Of Counsel

Appendix to Brief

Excerpt from contract between Doubleday and Co. Inc. and Louis Nizer (Plaintiffs' exhibit 8 for id dated February 21, 1974):

21. Author represents and warrants to Publisher that:

(a) The work is original. . . .

(d) If published, the work will not infringe upon any proprietary right at common law, or any statutory copyright, or any other right whatsoever.

(e) The work is innocent, and contains no matter whatsoever that is obscene, libelous, in violation of any right of privacy, or otherwise in contravention of law.

22. (a) Author shall indemnify and hold Publisher harmless from any claim, suit, or action, and any expense or damage in consequence thereof, asserted by reason of Publisher's exercise or enjoyment of any of its rights hereunder or by reason of any warranty or indemnity made by Publisher in connection with the exercise of any such rights, as provided in subparagraphs (c), (c), (d) and (e) hereof, but only to the extent that the foregoing shall arise or result from, or be caused by a breach or breaches of Author's representations and warranties set forth herein.

(b) Publisher shall have the right to defend such claim, suit or action by counsel of its selection and with the consent of Author to settle the same on such terms as it deems advisable.

(c) In the event a final judgment is entered against Publisher, Author shall be liable for and shall pay to Publisher the amount of said judgment and shall reim-

burse Publisher for any and all expenses incurred in said action, including counsel fees. . . .

(g) The warranties contained in Paragraph 21 and the indemnities contained in this Paragraph 22 shall survive the termination of this Agreement.

Publisher shall have the right in its discretion to extend the benefit of Author's aforesaid warranties and indemnities to any person, firm or corporation at any time and Author shall be liable thereon as if originally made to such person, firm, or corporation.

Served Trip (2) Copies of the written
Brief is admitted the 10th day of July 1974

at 2:55 Satterlee & Stephens RTH
attest Dept of the Secretary
for the Court Foreman

Phillips, Nye, Benjamin, Lewis
attest to the fact of the Nye
Ballou

